

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 02-10519

ADVERSARY PROCEEDING NO: 02-80342

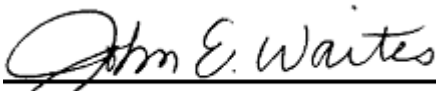
Judgment

The relief set forth on the following pages, for a total of 2 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
02/10/2003



Entered: 02/10/2003


US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Donald B. Kinder,

Debtor.

Donald B. Kinder,

Plaintiff,

v.

Janet L. Kinder,

Defendant.

C/A No. 02-10519-W

Adv. Pro. No. 02-80342-W

JUDGMENT

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order, the Court denies the relief sought by Donald B. Kinder (“Plaintiff” or “Debtor”) in his Complaint and finds that Plaintiff’s obligation to Janet L. Kinder (“Defendant”) is in the nature of alimony, maintenance, or support and is therefore excepted from discharge pursuant to 11 U.S.C. §523(a)(5). The Court also finds that no assignment occurred to render Plaintiff’s obligation dischargeable pursuant to 11 U.S.C. §523(a)(5)(A). As to Defendant’s Motion for relief from the automatic stay, the Court shall consider it for final hearing at confirmation. The Court presently denies Defendant’s request for attorney’s fees.

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 02-10519

ADVERSARY PROCEEDING NO: 02-80342

Order

The relief set forth on the following pages, for a total of 8 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
02/10/2003



Entered: 02/10/2003

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Donald B. Kinder,

Debtor.

Donald B. Kinder,

Plaintiff,

v.

Janet L. Kinder,

Defendant.

C/A No. 02-10519-W

Adv. Pro. No. 02-80342-W

ORDER

Chapter 13

THIS MATTER comes before the Court upon the Complaint filed by Donald B. Kinder (“Plaintiff” or “Debtor”) and the Motion to Modify Stay (the “Motion”) filed by Janet L. Kinder (“Defendant” or “Movant”).¹ In his Complaint, Plaintiff seeks to have the Court to declare his obligation to Defendant arising from a 1988 divorce decree dischargeable pursuant to 11 U.S.C. §523(a)(5)(B) and the decree avoidable pursuant to §522(f)(1)(A)(ii) because the obligation therein is not in the nature of alimony, maintenance, or support.² Alternatively, Plaintiff argues that the divorce decree contains an assignment of debt to a third party that renders the obligation dischargeable pursuant to §523(a)(5)(A). In response, Defendant disputes Plaintiff’s characterization of the obligation and argues that it is spousal support or alimony. Defendant also argues that no portion of Plaintiff’s obligation was ever assigned and that, under the terms of the divorce decree, it can no

¹ On November 20, 2002, the Court entered an Order consolidating the Complaint and the Motion in order to consider the matters concurrently.

² Further references to the Bankruptcy Code shall be by section number only.

longer be assigned. Defendant then asks the Court not to avoid the judicial lien, declare the obligation under the divorce decree nondischargeable, and award her appropriate attorney's fees and costs. In the Motion, Defendant seeks relief from the automatic stay pursuant to §362(d)(1) and (d)(2) to allow her to pursue available state court remedies in the Family Court in Richland County, South Carolina. Defendant again requests her attorney's fees. In response, Plaintiff objects to lifting the automatic stay. After considering the pleadings related to the adversary proceeding and the Motion, the affidavit and evidence presented at the hearing, and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.³

FINDINGS OF FACT

1. On August 27, 1988, the Fairfax County Circuit Court of Virginia entered a Final Decree of Divorce (the "Divorce Decree") for Plaintiff and Defendant. In the Divorce Decree, the court incorporates the Settlement (the "Settlement Agreement") the parties entered into on May 24, 1988. The Settlement Agreement addresses the division of property and debts as well as spousal support.
2. In the Settlement Agreement, Plaintiff agrees to pay "spousal support" to Defendant in the amount of \$1,200 per month for sixty months. Beginning on June 1, 1988, Plaintiff agrees to make a \$600 payment on the first day of each month followed by an additional \$600 payment on the fifteenth day of each month. After making these payments for sixty months, Plaintiff agrees to pay Defendant \$600 per month on the first day of

³ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

each month for an additional forty-eight months.

3. The Settlement Agreement further provides that, in the event Defendant remarries within the five year period when Plaintiff will make monthly payments of \$1,200, Plaintiff shall pay the \$600 payment due on the fifteenth of each month to Ron Devine (“Mr. Devine”) in discharge of a promissory note that Plaintiff executed in Mr. Devine’s favor.⁴

4. The Settlement Agreement further provides that, upon the death of either party, spousal support shall cease.

5. The Settlement Agreement also provides that the note Plaintiff executed to Mr. Devine will be forgiven and discharged provided that Plaintiff performs the terms of the Settlement Agreement. 6. When the parties divorced, they were ending a twenty year marriage. At that time, Plaintiff owned a business that generated steady income, and Defendant was suffering from back injuries sustained in a fall that left her unable to work. In fact, Defendant has been unable to work for seventeen years, and she currently suffers from five ruptured discs, bilateral carpal tunnel syndrome, and clinical depression.

7. Plaintiff testified that he deducted all payments he made to Defendant as alimony on his income tax returns.

8. In 1993, Plaintiff filed a Complaint in the Family Court for the Fifth Judicial Circuit of South Carolina seeking a modification of the Divorce Decree. In this Family Court Complaint, Plaintiff referred to his obligation to Defendant as “alimony.”

9. Defendant never remarried; consequently, Plaintiff made no payments to Mr. Devine.

⁴ Mr. Devine is Defendant’s nephew.

10. As of April 9, 2002, Plaintiff owed \$56,800 for this obligation. Plaintiff has not made any payments since that date to reduce the amount of the debt.

11. Plaintiff filed his Petition seeking Chapter 13 bankruptcy relief on September 4, 2002.

CONCLUSIONS OF LAW

A. Section 523(a)(5)(B): Liability in the Nature of Alimony, Maintenance, or Support

To determine the nature of an obligation arising from a separation or divorce proceeding, bankruptcy courts usually consider whether the family court intended the obligation to be one for support. See Baker v. Baker (In re Baker), 274 B.R. 176, 188 (Bankr. D. S.C. 2000). In addition, courts usually examine other factors as guidance to determine the nature of the obligation. See id. In Baker, the Court considered the following four factors in reaching its conclusion that an obligation was in the nature of support: (1) the actual substance and language of the divorce decree or property settlement agreement, (2) the financial situation of the parties at the time of the decree or agreement, (3) the function served by the obligation at the time of the agreement, and (4) whether there is any evidence that causes a court to question the intent of a spouse. See id. at 189 (citing In re Catron, 164 B.R. 912, 919 (E.D. Va. 1994), aff'd 43 F.3d 1465 (4th Cir. 1994)).

In this case, the Court finds that the obligation is in the nature of alimony, maintenance, or support. The parties described the obligation as “spousal support” in the Settlement Agreement. Further, the circumstances at the time of the divorce indicate Defendant needed support as her twenty year marriage was ending, she had suffered injuries and was unemployed, and Plaintiff owned a business generating steady income. Moreover, nothing in the Settlement Agreement links property or debt division to the payments Plaintiff agreed to make. Indeed, the Court believes that the payments the parties agreed to are similar to lump sum alimony, and, although the Virginia statute may not have formally recognized this form of alimony when the parties’ divorce

decree was entered, the Fairfax County Circuit Court of Virginia approved the agreement and adopted its substance. The Court also notes that Plaintiff treated this obligation as alimony on his tax returns and referred to the obligation as alimony when he sought to modify the amount he owed Defendant. As such, the Court denies the relief sought in the Complaint and finds that this debt is excepted from discharge pursuant to §523(a)(5).

B. Section 523(a)(5)(A): Assignment of Alimony, Maintenance, or Support

Although a debt that is in the nature of alimony, maintenance, or support of a spouse or a child is excepted from discharge, the debt is dischargeable to the extent that it is assigned to another entity other than debts assigned pursuant to §408(a)(3) of the Social Security Act or any such debt that has been assigned to the federal government or to a state or any political subdivision of a state. See §523(a)(5)(A). In this case, Plaintiff asserts that the debt is dischargeable because the Settlement Agreement includes provisions that assign an obligation to Mr. Devine, a third party.

In its review of the Settlement Agreement, the Court concludes that no assignment was made to Mr. Devine. The Court reaches this conclusion because, under Virginia law, if an assignment is conditional or contingent, the assignee acquires no rights under an assignment until the condition is fulfilled. See Phoenix Ins. Co. v. Lester Bros., Inc., 127 S.E.2d 432, 437-38 (Va. 1962) (finding that no assignment occurred because a condition that no liens were outstanding or pending when payments were due was not fulfilled). In this case, the assignment of support payments to Mr. Devine was conditioned upon Defendant remarrying within the first five years of the Settlement Agreement. As such, no assignment could have occurred unless the condition were fulfilled, and, in this case, it was not.

The Court also notes that the ability to assign a right to payment is fluid, not static. Indeed, a recipient

of alimony, maintenance, or support can have the ability to assign rights to receive alimony, not exercise the assignment right, and still be in a position where the obligation is excepted from discharge provided no assignment has been made. See In re Mozingo, 153 B.R. 276 (Bankr. W.D. Mo. 1993). For example, in Mozingo, the debtor was ordered to pay his former spouse monthly payments for maintenance and support as well as the former spouse's attorney's fees. Subsequently, the former spouse assigned all of her interest in the judgment for the maintenance and the fees to her attorney. The attorney then revoked the assignment for maintenance but not to his fees. The court declared the amount represented by the fees dischargeable because the spouse assigned this debt to another entity. Dealing with the maintenance obligation and its arrearage, the court discharged the arrearage accumulating prior to the date the attorney revoked the assignment because of a literal interpretation of §523(a)(5)(A). However, the court held that the revocation of the assignment cured the taint of assignment as to future payments; accordingly, sums due following the date of revocation were declared nondischargeable. See id. at 279. To this Court, Mozingo indicates that the ability to assign a debt is distinguishable from actually assigning the obligation to another entity. Indeed, the right to assign, as contemplated in the Divorce Decree, can exist but that it does not render the debt dischargeable until it is executed and actually assigned. In this case, Defendant's actions did not constitute an assignment of her right to alimony, maintenance, or support because the condition precedent, her remarriage within five years, never occurred.

For these reasons, the Court concludes that the obligation is not dischargeable under §523(a)(5)(A) because there was no assignment.

C. Defendant's Motion for Relief from the Stay

At this time, the Court finds it is inappropriate to grant Defendant's Motion and lift the automatic stay.

Although the Court finds that the debt at issue in the stay proceedings is excepted from discharge, it also believes that Plaintiff should have a reasonable time in which to propose a confirmable plan that addresses the alimony debt. Defendant's Motion shall be considered for a final hearing at confirmation.

D. Defendant's Request for Attorney's Fees

In both the adversary proceeding and in her Motion, Defendant requested attorney's fees. The Court denies these requests because Defendant presented no evidence or argument indicating a legal basis for the award of her attorney's fees at this time. See 1 John B Butler, III, The Bankruptcy Handbook §7.1 (1997) (Supp. 2002).

CONCLUSION

From the arguments discussed above, it is therefore

ORDERED that Plaintiff's obligation to Defendant is in the nature of alimony, maintenance, or support and is therefore excepted from discharge pursuant to §523(a)(5);

IT IS FURTHER ORDERED that no assignment occurred to render Plaintiff's obligation dischargeable pursuant to §523(a)(5)(A);

IT IS FURTHER ORDERED that Defendant's Motion for relief from the automatic stay shall be considered for final hearing at confirmation; and

IT IS FURTHER ORDERED that Defendant's request for attorney's fees is presently denied.

AND IT IS SO ORDERED.